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DIVISION ONE

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No. 69338-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DEBRA FULWILER,

Appellant,

v.

ARCHON GROUP L.P., *et al.*,

Respondents.

BRIEF OF APPELLANT DEBRA FULWILER

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STATE OF WASHINGTON
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I. INTRODUCTION

This is a case about dangerous "vanishing" stairs that have multiple deficiencies including a camouflage defect caused by blending aggregate rock and building code violations. Despite two expert declarations that revealed these defects and raised clear issues of fact about the proximate cause of Appellant's injuries, which were caused by Appellant's trip and fall on the defective stairs, the trial court inexplicably dismissed Appellant's negligence claims against the owners and occupiers of the defective stairs.

Appellant Debra Fulwiler ("Fulwiler") seriously injured herself when, as an invitee on Respondents' property, she tripped and fell on defective stairs owned and maintained by Respondents. She brought a lawsuit alleging that Respondents breached their duty of care to Fulwiler as an invitee; that the stairs/handrails had numerous defects, including that the handrails failed to comply with the relevant building code; and that the defects in the stairs/handrails caused Fulwiler's injuries. Respondents filed motions for summary judgment, primarily on causation. Fulwiler opposed Respondents' summary judgment motions with the declarations of two experts who described the defects in the stairs and testified that the defects caused or contributed to Fulwiler's fall. Despite the overwhelming evidence presented in the experts' declarations, and in her own

declaration, the Honorable Monica J. Benton granted Respondents' motions and dismissed Fulwiler's claims without explanation.

II. ASSIGNMENT OF ERROR

A. The trial court erred in finding that there was no genuine issue of fact that precluded the trial court from granting summary judgment in favor of Archon Group, Whitehall Street Real Estate, W2007 Seattle Office 10700 Building Realty, WA-10700 Building and CB Richard Ellis, Inc. ("Archon"), as to Appellant's negligence claim, in its order dated September 5, 2012.

B. The trial court erred in finding that there was no genuine issue of fact that precluded the trial court from granting summary judgment in favor of Bellevue College (formerly Bellevue Community College ("BCC")), as to Appellant's negligence claim, in its order dated September 14, 2012.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Was there a genuine issue of material fact, viewing the evidence in the light most favorable to Fulwiler, about whether Archon breached its duty to Fulwiler, an invitee, and proximately caused Fulwiler's injuries?

(Assignment of Error A)

B. Was there a genuine issue of material fact, viewing the evidence in the light most favorable to Fulwiler, about whether Bellevue College breached its duty to Fulwiler, an invitee, and proximately caused Fulwiler's injuries?

(Assignment of Error B)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Appellant (Plaintiff) Debra Fulwiler filed this action on September 2, 2011. CP 1–7. Fulwiler alleged that Respondents (Defendants) Archon Group, Whitehall Street Real Estate, W2007 Seattle Office 10700 Building Realty, WA-10700 Building and CB Richard Ellis, Inc. ("Archon") and Bellevue College (formerly Bellevue Community College ("BCC")), State of Washington ("Bellevue College") owned and maintained a stairwell and handrails (the "Stairs") at 10700 Northup Way in Bellevue, Washington (the "Property"). CP 4–5. Fulwiler alleged that Respondents failed to maintain the Stairs in a safe condition free from defects, including building code violations, and that as a proximate cause of Respondents' negligence, Fulwiler suffered injuries. CP 1-7.

On July 13, 2012, Respondents filed motions for summary judgment. CP 8–122. Fulwiler timely filed her response on July 31, 2012. CP 123–245. Fulwiler's response included, among other documents, her

own declaration, CP 207–213, the Declaration of Thomas K. Baird, a safety expert, CP 149–206, and the Declaration of Gary D. Sloan, Ph.D., a human factors expert. CP 214–245. Respondents replied on August 6, 2012. CP 246–272. Fulwiler filed a Surreply. CP 273–277. A hearing was held on Respondents' motions for summary judgment on August 10, 2012. *See* Record of Proceedings of Motion Hearing on August 10, 2012 ("Record"). At the hearing, the trial court ordered further briefing on the applicability of *Seiber v. Poulsbo Marine Center*, 136 Wn. App. 731 (Div. II. 2007), a case raised by Respondents at oral argument. *See* Record 22:3–22:8. Fulwiler filed her Supplemental Response on *Seiber* on August 14, 2012, CP 279–286, and Respondents replied on August 16, 2012. CP 287–297.

The trial court granted Archon's motion for summary judgment on September 5, 2012. CP 298–299. The trial court granted Bellevue College's motion for summary judgment on September 14, 2012. CP 300–303. The trial court entered judgment in favor of Bellevue College on October 10, 2012. CP 323–325.

B. FACTUAL BACKGROUND

1. The Purpose Of Plaintiff Fulwiler's Visit To Bellevue Community College Establishes That She Was An Invitee

On September 5, 2008, Fulwiler went to Bellevue College with her friend to show her friend where to register for classes and to visit the bookstore. CP 208. Both Fulwiler and her friend visited the bookstore and browsed for books. *Id.* Fulwiler intended to purchase a book if she found something she liked, and asked a bookstore employee some questions about a book which she was interested in. *Id.* Fulwiler's friend purchased a book, but Fulwiler decided not to make a purchase at the Bookstore. *Id.*

2. Plaintiff Descended The Hazardous Stairs And Sustained A Debilitating Ankle Injury

Leaving the Bookstore, Fulwiler descended the stairs ("the Stairs") at the 10700 Building that are the subject of the Complaint. CP 208. She testified that she relied heavily on the handrail while descending the Stairs. *Id.* She grasped the handrail and, as her foot was in motion leaving the first step, she naturally looked down for cues about where to place her foot on the next step. *Id.* As she did so, the individual steps of the aggregate rock Stairs blended together so that the steps were indiscernible from one another. *Id.* Fulwiler subsequently fell on the aggregate rock cement with considerable force, despite attempting to restrain her fall with the handrail,

and she suffered multiple fractures to her ankle and a dislocation, an injury that would leave her permanently disabled after multiple surgeries. *Id.*

3. In The Opinion Of Two Experts The Stairs Caused Plaintiff's Fall Because They Are Unreasonably Dangerous And Fail To Meet The Building Code and National Consensus Safety Standards

In response to Respondents' motions for summary judgment, Fulwiler presented detailed declarations from two experts – Thomas K. Baird, a safety expert, and Gary Sloan, Ph.D., a human factors expert.

i. Declaration of Thomas K. Baird – a safety expert with experience in over 900 cases

Thomas K. Baird, the principal of Safety Systems America, Inc., is a safety expert who has been retained in over 900 legal matters, primarily in the context of premises liability and safety. CP 149–150. He is a court qualified safety expert, having testified at 30 jury trials in state and federal courts, and he is a former general contractor with 39 years of experience with construction safety issues. *Id.* Mr. Baird visited the site of the incident, examined the Stairs, met with Plaintiff, and reviewed relevant materials. CP 150. Mr. Baird testified that in his expert opinion, the subject stairs are "unreasonably hazardous and dangerous because there was no contrast on the nosings of the steps in order for Debra Fulwiler to adequately identify the step edge. This hazardous condition presented an unreasonable risk of injury to her as she walked down the stairs." CP 150-

151. He also testified that this risk "was foreseeable such that the owner or occupier of the subject property would discover the condition through reasonable care, and would realize, not only that it involves an unreasonable risk to persons using the stairs, but that it is a danger that someone using the stairs would not realize and would not be prepared to protect themselves from." *Id.* "It would have been easy, and very inexpensive, to paint the step edges yellow to identify them." *Id.*

Mr. Baird also testified that the Stairs do not comply with the American Society for Testing and Materials (ASTM) F1637-95 Standard Practice for Safe Walking Surfaces, a nationally recognized consensus safety standard; that the rise and run of the stairway exceeded the 3/8" variance allowed under the 1979 Uniform Building Code (UBC); and that the excessive variance in the rise and run of the Stairs may have been a contributing factor in Fulwiler's fall on the stairs. CP 150-152.

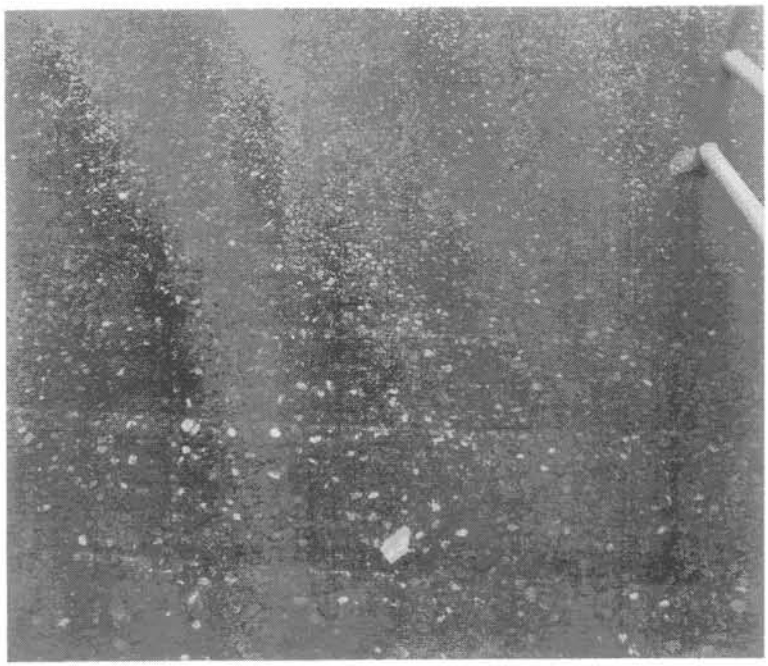
ii. Declaration of Gary D. Sloan, Ph.D. – a human factors expert

Gary Sloan, Ph.D., a human factors expert, visited the site on July 26, 2012, examined the Stairs, interviewed Fulwiler, and reviewed relevant materials. CP 217–218. He measured the luminance of the Stairs and testified that "there was little difference in brightness between the nosing of the middle landing and the tread of the step immediately

below it . . .". CP 220. He testified that in his "opinion as a human factors specialist, there was inadequate contrast" between the stair landing and the steps, and that the aggregate rock of the stairs created a camouflaging effect. CP 220–221. In addition, Dr. Sloan testified that the height of the handrails of the stairwell may have contributed to Fulwiler's fall and the stairwell posed an unnecessary risk to pedestrians that should have been appreciated by defendants (Respondents). CP 221–223.

iii. The Dangerous "Vanishing" Condition Of The Stairs Is Visible In Photos Taken In The Direction Of Plaintiff's Travel

The dangerous vanishing step condition of the stairs is visible in photographs of the stairs when those photos are taken in the direction of Plaintiff's travel just prior to the injury. CP 211.



IV. ARGUMENT

A. Standards of review

This Court reviews summary judgment orders *de novo*, performing the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). On summary judgment, all facts are construed, and all reasonable inferences are drawn, in favor of the nonmoving party. *Id.* Summary judgment is appropriate only when no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. *Id*; CR 56(c).

B. The Declarations Of Fulwiler And The Two Experts Raised Issues Of Fact For The Jury On Breach Of Duty And Causation That Should Have Precluded Summary Judgment

In order to prevail on her negligence claims, Fulwiler must establish: (1) the existence of a duty owed; (2) breach of that duty; (3) a resulting injury; and (4) a proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Respondents did not contest that Fulwiler was injured, and all but conceded that they owed Fulwiler a duty as an invitee at the Property.

1. Respondents Owed A Duty To Fulwiler As An Invitee

The question of whether defendants owed a duty to a plaintiff is a question of law. *Id.* at 128. Respondents all but conceded that the scope

of the duty they owed to Fulwiler was that owed to an invitee. The evidence before the trial court at summary judgment indicated that Fulwiler went to BCC with her friend, in part, for the purpose of showing her friend where to register for classes. She also intended to purchase a book if she found something she liked, and while Fulwiler's friend purchased a book, Fulwiler decided not to make a purchase.

Washington adopts the RESTATEMENT (SECOND) OF TORTS §332 as the appropriate standard for determining landowner liability to persons on land. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986); *Tincani*, 124 Wn.2d at 133. Under Washington law, Fulwiler was a public invitee because she was impliedly invited to BCC as a member of the public to go to the Bookstore that BCC held open to the public for the purpose of the sale and purchase of books. Additionally, Fulwiler was a business invitee because she entered BCC for two business purposes connected to business dealings with BCC, and benefitting Defendants: a direct business purpose (the potential purchase of a book) and an indirect business purpose (as an assistant to a business invitee – her friend – who was seeking to register for classes).

The law is clear that an actual sale need not take place for a potential customer to be considered a business invitee. *Kinsman v. Barton & Co.*, 141 Wn. 311, 314, 251 P. 563 (1926) (even a "window shopper" is

a business invitee, and visitors to a store are business invitees even if they do not make a purchase, the mere possibility of a future purchase being sufficient); RESTATEMENT (SECOND) OF TORTS §332 (1965), *comment f* ("It is not necessary that the visitor's purpose be to enter into immediate business dealings with the possessor. The benefit to the possessor may be indirect and in the future."). Also, a person accompanying a friend is a business invitee if the friend intends to make a purchase. RESTATEMENT (SECOND) OF TORTS §332 (1965), *comment g* ("Visits incidental to business relations of possessor and third persons. It is not necessary that the visitor shall himself be upon the land for the purposes of the possessor's business. . . . So too, a child taken by a mother or nurse to a shop is a business visitor; and this is true irrespective of whether it is necessary for the customer to take the child with her in order to visit the shop."); *see also, Farrier v. Levin*, 176 Cal.App.2d 791, 1 Cal Rptr. 742 (1959) (person accompanying a friend into store where friend intended to make a purchase was an invitee).

As such, Defendants owed a duty to Fulwiler to exercise reasonable care for her personal safety and ascertain and warn her of conditions on the premises that pose an unreasonable risk of harm. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

Defendants failed to meet this duty because they failed to ascertain and warn Fulwiler of a dangerous condition on the non-compliant stairs.

i. It Is A Question For The Jury Whether Respondents Had Constructive Notice Of The Defects

A landowner's duty attaches if the landowner had actual or constructive notice of the unsafe condition; in other words, if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk." *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). The landowner has a duty "to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances." *Id.*

In this case, Fulwiler's response and the accompanying declarations raised questions of fact about whether defendants had constructive notice of the unsafe condition of the stairs. The stairs were constructed more than 25 years before they were used by Fulwiler; as such, there is a genuine issue of material fact for the jury about whether Defendants should have discovered the condition during the time that they owned and occupied the premises.

Tom Baird testified that the hazardous condition of the stairs presented an unreasonable risk of injury to Fulwiler and the risk "was

foreseeable such that the owner or occupier of the subject property would discover the condition through reasonable care, and would realize, not only that it involves an unreasonable risk to persons using the stairs, but that it is a danger that someone using the stairs would not realize and would not be prepared to protect themselves from." CP 150–151 (emphasis added). Dr. Sloan testified that "[t]he defendants should have appreciated the danger [of the "vanishing" stairs] and minimally demarcated the nosing of the steps so that they contrasted with the landing. In my opinion, had such a precaution been taken, more likely than not, Debra Fulwiler would not have been injured on September 5, 2008." CP 222–23 (emphasis added).

These statements raise factual questions concerning constructive notice and the question of whether Respondents by the exercise of reasonable care would (or should) discover the condition and should realize that it involves an unreasonable risk.

Baird's opinion that the condition was foreseeable may also raise a question of fact in this case that provides an exception to the notice requirement. If a specific unsafe condition is foreseeable in the nature of the business, a plaintiff need not prove notice for liability to be imposed. *Iwai*, 129 Wn.2d at 98. "A jury must decide whether such risk was

foreseeable, and whether Defendants fulfilled their duties in light of the foreseeability of the risk." *Iwai*, 129 Wn.2d at 102.

2. The Declarations of Fulwiler's Experts Raised Genuine Issues Of Material Fact About Whether Respondents Breached Their Duty To Exercise Reasonable Care

There was clear evidence of a breach of duty and causation provided by the declarations of Tom Baird and Gary Sloan, Ph.D., filed in support of Fulwiler's response – certainly enough to raise genuine issues of material fact about breach and causation (especially when viewing the evidence in the light most favorable to Fulwiler) that should have precluded the trial court from dismissing Fulwiler's claims.

Both experts visited the site, interviewed Fulwiler, analyzed the subject stairs and handrails, and reviewed relevant documents. Both experts have significant education and experience, and their declarations were based on personal knowledge. The experts identified a number of defects in the Stairs that raised material issues of fact (certainly when the evidence is viewed in the light most favorable to the non-moving party, Fulwiler) about whether Respondents breached their duty to Fulwiler to exercise reasonable care for her personal safety and ascertain and warn her of conditions on the premises that pose an unreasonable risk of harm.

i. The Stairs Presented A Vanishing Effect That Camouflaged The Steps

Tom Baird testified that in his expert opinion, the subject stairs are "unreasonably hazardous and dangerous because there was no contrast on the nosings of the steps in order for Debra Fulwiler to adequately identify the step edge. This hazardous condition presented an unreasonable risk of injury to her as she walked down the stairs." CP 150-151. Baird's expert conclusion that the stairs created a hazardous condition is admissible. ER 704; *Davis v. Baugh Indus. Contractor's Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007) (holding trial court erred in striking portions of expert's declaration that stated a pipe created a 'hazardous condition').

Dr. Sloan measured the luminance of the steps and observed that there was "little difference in brightness between the nosing of the middle landing and the tread of the step immediately below it" (where the evidence showed Fulwiler fell) and that in his expert opinion, "there was inadequate contrast . . . to clearly distinguish where the landing ended and the step began." CP 220. He also testified that the steps contained "a problem with perceptual grouping, which is a key perceptual process underlying successful camouflage." *Id.* He concluded that, "[w]ith respect to the aggregate concrete surfaces of the stairway implicated in Ms. Fulwiler's fall, more likely than not, the aggregate at the edge of the

middle landing would have been perceptual grouped with aggregate immediately below it, thereby camouflaging the step's edge." CP 220–21. Dr. Sloan testified that in his opinion as "a human factors specialist, the stairway implicated in Debra Fulwiler's accident posed an unnecessary risk to pedestrians." CP 222.

Based on these experts' declarations, the stone aggregate stairs contain a camouflage characteristic that causes them to "vanish" under certain lighting conditions. It should have been left to the jury to decide whether this constitutes a hazardous condition that posed an unreasonable risk of harm to Fulwiler and, if so, whether Respondents exercised reasonable care for her safety in relation to the condition.

ii. The Stairs Did Not Comply With An ASTM Standard

Mr. Baird also testified that the Stairs do not comply with the American Society for Testing and Materials (ASTM) F1637-95 Standard Practice for Safe Walking Surfaces, a nationally recognized consensus safety standard; that the rise and run of the stairway exceeded the 3/8" variance allowed under the 1979 Uniform Building Code (UBC); and that the excessive variance in the rise and run of the Stairs "may have been a contributing factor in Debra Fulwiler's fall on the stairs." CP 150-152. There is no dispute that the 1979 UBC applied to the stairs.

Violation of a legal requirement is evidence of negligence. RCW 5.40.050; *Pettit v. Dwoskin*, 116 Wn. App. 466, 473, 68 P.3d 1088 (2003). A jury must determine whether the building code was violated and, if so, whether there was a nexus between that violation and the harm suffered, such that the violation was evidence of negligence. *See Short v. Hoge*, 58 Wn.2d 50, 52, 360 P.2d 565 (1961) ("It was the province of the jury to determine from all of the evidence relative thereto whether, in fact, the structure" did comply with the building code). These questions of fact should have precluded summary judgment.

iii. The Handrails Presented An Unreasonable Risk

Dr. Sloan testified that the handrail height showed a high degree of variance that may have contributed to Fulwiler's fall by destabilizing her gait during descent of the stairs. CP 221–22. He also testified that the handrail was not ADA-compliant in accordance with a relevant 1976 regulation because the subject handrail did not have a continuous handrail with a consistent height. CP 222, 244–45. The question of whether the handrails were ADA-complaint according to the 1976 regulation were important because Fulwiler testified that she "relied heavily on the handrail while descending the stairs," CP 208, and the evidence showed that Fulwiler had a disability and a handicap parking sticker. CP 219.

3. The Testimony By Fulwiler And Her Experts Raised Genuine Issues Of Material Fact About Proximately Cause

"The issue of proximate cause is generally a question of fact for the jury and not subject to determination at summary judgment as a matter of law." *Ruff v. County of King*, 125 Wn.2d 697, 703-04 (1995); *Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). Because the question of proximate cause if for the jury, "it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." *Bernethy*, 97 Wn.2d at 935.

The declarations filed in support of Appellant's demonstrate that the facts about causation are disputed and raise genuine issues of material fact (especially when viewing the evidence in the light most favorable to Fulwiler) that should have precluded the trial court from dismissing Fulwiler's claims.

Fulwiler's deposition testimony, and her experts' declarations, raised genuine issues of material fact sufficient to preclude summary judgment on causation. Fulwiler states at least three times in her deposition testimony that the cause of her fall was her inability to see the steps, and then presents two expert declarations that support her deposition testimony:

Q. And what happened? What caused you to fall?

Mr. Malcolm: Object to the form.

A. As you can see from here, you cannot hardly tell one step from the other here. And that's what I believe that's why I fell.

By Mr. Wallace:

Q. But my question is do you can you tell me the mechanism of where your feet were?

Mr. Malcolm: Object to the form

A. You know, I don't understand the question.

. . .

Q. So what happened from that point on? Did your feet keep going in front of you?

A. The only thing I could tell you I couldn't see the step.

Q. But did you keep walking?

A. I fell at that point, very first step. . . .

CP 119, 283 (emphasis added). And again:

Q . . . . do you have any understanding of what the mechanism that – the bodily mechanism that caused you to fall?

A. Are you saying the fact that I couldn't see the stairs?

Q. Could you see the stairs?

A. No, I could not.

CP 120, 283 (emphasis added). The "vanishing steps" caused the fall; it is up to the jury to decide whether they agree. On summary judgment, the inferences must be viewed in favor of the plaintiff, and here Fulwiler, through consistent and adequate deposition testimony, and her own and experts' declarations, has raised issues of fact for the jury on every element of her negligence claim.

C. The Court Misapplied The *Seiber* Case Which Supports Denial Of Respondents Summary Judgment Motions

As shown in the Record of Proceedings, the trial court had the correct initial read on Respondents' summary judgment motions at the start of oral argument. The court inquired:

> The Court: Maybe I can direct this. The plaintiff has responded with expert declarations concerning the nature of the stairs and whether they present an invisible –
> Mr. Wallace: Right.
> The Court: -- harm, if you will. It's kind of an oxymoron, but an invisible stairwell, which makes it possible for people to fall.
> Mr. Wallace: Right.
> The Court: As well as the argument that the handrails are not within code.
> Mr. Wallace: That's correct.
> The Court: <u>Does that not raise a factual question</u>?

Record of Proceedings of Motion Hearing on August 10, 2012 (5:15–6:2) (emphasis added).

Yet, at the conclusion of the summary judgment hearing, the trial court requested supplemental briefing on the applicability of the *Seiber v. Poulsbo Marine Center*, 136 Wn. App. 731 (Div. II. 2007), a case raised by Respondents at oral argument. *See* Record 22:3–22:8. Respondents argued that *Seiber* supported the dismissal of Fulwiler's claims. Contrary to the argument of Respondents' counsel, and as briefed in Fulwiler's Supplemental Response on *Seiber*, CP 279–285, the *Seiber* case actually supported denial of Respondents' summary judgment motions.

Seiber is a case that turns on speculative evidence about breach of duty of a third party not responsible for the defect. In *Seiber*, defendant Poulsbo Marine Center ("PMC") was displaying merchandise on a boardwalk that ran alongside PMC's building. Carol Seiber fell down stairs while she was looking at the merchandise. All of Seiber's evidence pointed to a defect in the design of the boardwalk, not some "defect" that the marine center had caused in the boardwalk by virtue of its use of the area adjacent to the boardwalk. Nevertheless, fatal to her claims, Seiber sued PMC and its landlord, rather than the entities responsible for the boardwalk; as such, she could only speculate about how PMC breached its duty to keep the boardwalk safe as a result of PMC's actions (displaying goods by the boardwalk).

That is entirely distinguishable from the allegations made by Fulwiler. Respondents are trying to apply *Seiber* by confusing the distinction between a duty that arises as a result of acts adjacent to a defective structure (PMC displaying goods beside a defective boardwalk) and a duty that arises as a result of having responsibility for the defective structure itself (Respondents are owner/occupiers of the stairs at Bellevue college). In fact, unlike Fulwiler, Carol Seiber "never expressly alleged that any acts of defendants [the marine center] caused

her to fall." *Seiber*, 136 Wn. App at 740 (emphasis added). The Court stated:

> Seiber does not allege that PMC's merchandise warped the boardwalk or damaged the boards in any way. Instead, she alleges that the boardwalk was deficiently designed and built. Because she does not draw a causal connection between PMC's use of the boardwalk and the alleged defects, Seiber has not shown any possible breach of duty through PMC's special use.

Id. In contrast, even a quick read of Fulwiler's Complaint reveals that she alleges that specific acts of Respondents caused her to fall on the defective stairs; namely, Respondents' failure to discover and correct a hazardous condition in the stairs, which included a building code violation, vanishing stairs due to a camouflaging effect, breach of a ASTM standard, and standard-deficient handrails. In fact, the *Seiber* court stated, in *dicta*, that had Seiber sued the entities responsible for the defective boardwalk (instead of the marine center), as Fulwiler has sued the entities responsible for the defective stairs, <u>the Seiber court would have denied summary judgment as this Court</u>.

> To the extent that the boardwalk may have been unsafe for pedestrians because of a defective design, Seiber <u>has a cause of action</u> against the entity (either the city or port of Poulsbo) <u>responsible for the boardwalk</u>. She does not have a cause of action against the owner or occupier of the adjacent building.

Seiber v. Poulsbo Marine Center, Inc., 136 Wn. App. 731, 739 (Div. II. 2007) (emphasis added). In the same way, Fulwiler has a cause of action against the entities responsible for the Stairs – the Respondents. Thus, *Seiber* actually supports denial of Respondents' summary judgment motions.

V. CONCLUSION

Because the declarations of Fulwiler and her two experts raised genuine issues of material fact that should have precluded summary judgment dismissal of Fulwiler's negligence claim, Fulwiler requests that this Court reverse the orders of the trial court granting summary judgment to Respondents and remand this matter to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 9th day of April, 2013.

VALDEZ MALCOLM PLLC

By */s/ Sean B. Malcolm*
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2013, I caused a copy of the foregoing document(s) described as BRIEF OF APPELLANT DEBRA FULWILER to which this certificate is attached to be filed with the Washington State Court of Appeals, and served on the following counsel of record, by email:

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DATED this 9th day of April, 2013 at Seattle, Washington.

/s/ Sean B. Malcolm
Sean Malcolm